

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL EDWARD GILBERT,

Plaintiff,

v.

CLEAR RECON CORP, et al.

Defendants.

No. 2:24-cv-2308-DC-CKD (PS)

ORDER AND

FINDINGS AND RECOMMENDATIONS

Plaintiff Paul Edward Gilbert proceeds pro se and this matter is before the undersigned pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302(c)(21). Plaintiff's motion for leave to file a second amended complaint (ECF No. 49) and motion to compel compliance with California Business & Professions Code § 6067 (ECF No. 65) are before the court. These matters are appropriate for decision without oral argument under Local Rule 230(g). Accordingly, the hearing set for March 26, 2025, is vacated. For the reasons set forth below, plaintiff's pending motions should be denied.

**I. Background**

Plaintiff initiated this action on August 26, 2024, naming various defendants and bringing claims arising out of an alleged wrongful foreclosure of a residential property. (ECF No. 1.) Plaintiff filed the operative first amended complaint ("FAC") on October 21, 2024. (ECF No. 18.)

1       Under the allegations in the FAC, plaintiff holds a federal Land Patent for the subject  
2 property and the Land Patent is “immune from collateral attack.” (ECF No. 18 at 4.) Plaintiff  
3 executed a Deed of Trust for the subject property “with explicit reservation of rights” to trial by  
4 jury under the Seventh Amendment, and, accordingly, the subsequent non-judicial foreclosure  
5 violated plaintiff’s reserved rights. (Id. at 4.) Despite holding an “unassailable title,” plaintiff was  
6 subjected to foreclosure proceedings “based on inferior instruments, such as a Deed of Trust,  
7 which cannot supersede a valid Land Patent.” (Id. at 5.) Defendant Clear Recon Corp., as trustee,  
8 violated its fiduciary duty by facilitating foreclosure proceedings without regard for plaintiff’s  
9 constitutional rights. (Id. at 7-8.) The FAC asserted six causes of action as follows: (1) Violation  
10 of the Seventh Amendment – Right to Trial by Jury; (2) Fiduciary Breach and Constitutional  
11 Principle affirmed in Miranda; (3) Negligence and Gross Negligence; (4) Due Process Violations;  
12 (5) Constructive Fraud; and (6) Unjust Enrichment. (Id. at 7-15.)

13       Various defendants moved to dismiss the FAC for failure to state a claim and plaintiff  
14 opposed the motions. (ECF No. 23, 27, 30, 31.) On December 19, 2024, the undersigned  
15 recommended plaintiff’s claims in the FAC against defendants Newrez, LLC dba Shellpoint  
16 Mortgage Servicing and Baron Silverstein (“Shellpoint defendants”), and against defendants  
17 Clear Recon Corp., Tammy Laird, Hamsa Uchi, Monica Chavez, Edward Jamir, Aldridge Pite,  
18 LLP, Steven Pite, Esq., and Casper Rankin, Esq. (“Clear Recon defendants”) be dismissed  
19 without leave to amend for failure to state a claim. (ECF No. 57 at 1, 9.) Those findings and  
20 recommendations are pending before the assigned district judge.

21       Plaintiff filed the present motion for leave to amend along with the proposed second  
22 amended complaint (“SAC”) on January 8, 2025. (ECF Nos. 49, 50.) Defendants opposed the  
23 motion. (ECF Nos. 58, 59, 60.)

24       Plaintiff filed the motion to compel compliance with California Business & Professions  
25 Code § 6067 on February 10, 2025. (ECF No. 65.) Defendants opposed the motion. (ECF Nos.  
26 67, 68, 69.)

27       On February 26, 2025, plaintiff filed a notice of a pending settlement agreement as to the  
28 claims against defendant Citibank, N.A. (ECF No. 71.) Dispositional documents are due April 28,

1 2025. (ECF No. 72.)

2 **II. Legal Standard for Leave to Amend**

3 When a party may not amend as a matter of course, that party “may amend ... only with  
 4 the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Courts should  
 5 freely give leave when justice requires, but a variety of reasons may be sufficient to deny leave to  
 6 amend. See Foman v. Davis, 371 U.S. 178, 182 (1962); DCD Programs, Ltd. v. Leighton, 833  
 7 F.2d 183, 186 (9th Cir. 1987). Courts in the Ninth Circuit consider the following factors: “(1) bad  
 8 faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5)  
 9 whether plaintiff has previously amended [the] complaint.” Ascon Properties, Inc. v. Mobil Oil  
 10 Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (citing Leighton, 833 F.2d at 186-87 & n. 3). Absent  
 11 prejudice or another strong showing against allowing amendment, a presumption in favor of  
 12 granting leave to amend exists under Rule 15(a). See Eminence Capital, LLC v. Aspeon, Inc., 316  
 13 F.3d 1048, 1052 (9th Cir. 2003).

14 In evaluating whether the proposed SAC states a claim on which relief may be granted,  
 15 the court accepts as true the allegations in the complaint and construes the allegations in the light  
 16 most favorable to plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The court  
 17 liberally construes pro se pleadings and affords pro se plaintiff the benefit of any doubt. Brett v.  
 18 Kelman, 773 F.2d 1026, 1027 (9th Cir. 1985). Nevertheless, the court is not required to accept as  
 19 true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
 20 inferences. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

21 **III. Discussion**

22 The proposed SAC raises materially the same allegations that were raised in the FAC, and  
 23 which do not state a claim. Because further amendment would be futile, leave to amend should be  
 24 denied. See Klamath–Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293  
 25 (9th Cir. 1983) (holding that, while leave to amend shall be freely given, the court need not allow  
 26 futile amendments).

27 Plaintiff’s other pending motion styled as a motion to compel seeks a court order requiring  
 28 defendants to “compl[y] with their statutory obligations under § 6067 by producing a license with

1 an indorsed oath of office.” (ECF No. 65 at 1-2.) Because plaintiff fails to state any cognizable  
 2 claim and further leave to amend should be denied, this motion should be denied as moot.

3 **A. Allegations in the Proposed SAC**

4 Plaintiff is the rightful owner of the property known as 11782 Blackberry Place in Nevada  
 5 City, California. (ECF No. 50 at 6.) Plaintiff obtained a mortgage secured by a Deed of Trust and  
 6 “rescinded the mortgage contract for fraud by sending a letter to NewRez LLC” on August 21,  
 7 2023. (*Id.* at 6.) On May 18, 2024, plaintiff sent a “Peremptory Notice to Cease and Desist” to  
 8 Clear Recon Corp. and NewRez LLC “detailing constitutional violations and reaffirming the  
 9 rescission due to fraud.” (*Id.* at 7 & 54-63.) Defendants did not respond. (*Id.* at 6-7.)

10 Clear Recon Corp. conducted a foreclosure sale, disregarding plaintiff’s objections “and  
 11 acting without proper legal authority in violation of the fiduciary standards established in *Hatch v.*  
 12 *Collins*, 225 Cal.App.3d 1104 (1990).” (ECF No. 50 at 7.) Defendant Citibank, as purchaser at  
 13 the foreclosure sale “subsequently initiated an unlawful detainer action to take possession of the  
 14 property... demonstrating reliance on state action for enforcement[.]” (*Id.* at 7, 49.)

15 Plaintiff issued subpoenas to Clear Recon Corp’s officers and agents, requesting  
 16 “documentation critical to establishing the validity of the foreclosure.” (ECF No. 50 at 7.) No  
 17 response was received. (*Id.*)

18 On December 19, 2024, the California Superior Court ordered in Case No. CL0001902  
 19 “that a stay for issuance of the writ of possession is granted until 11:00 a.m. on 12/19/2024” and,  
 20 further, “if [Paul E. Gilbert] delivers the check in the amount of \$3,133.20 to the clerk of the  
 21 court by 11:00 a.m. on 12/19/2024, then a stay of the writ of possession shall stay in effect until  
 22 1/22/2025 at 12:00 p.m.” (ECF No. 50 at 65.) “On December 19, 2024, [plaintiff] made the  
 23 payment and the Order was granted[.]” (*Id.* at 8.) Clear Recon Corp has failed to produce a single  
 24 document responsive to plaintiff’s subpoena addressing plaintiff’s objections. (*Id.*)

25 Against the Clear Recon Corp. defendants, the proposed SAC asserts the following causes  
 26 of action against: Breach of Duty (First Cause of Action); Breach of Duty Arising from Subpoena  
 27 (Second Cause of Action); Due Process Violation (Third Cause of Action); Constructive Fraud  
 28 (Fourth Cause of Action); Negligence/ Gross Negligence (Fifth and Sixth Causes of Action); and

1 Breach of Covenant of Good Faith and Fair Dealing (Seventh Cause of Action). (ECF No. 50 at  
 2 12-21.)

3 Against the Shellpoint defendants, the proposed SAC asserts the following causes of  
 4 action: Breach of Duty (Eighth Cause of Action; Constructive Fraud (Ninth Cause of Action); and  
 5 Fraudulent Misrepresentation (Tenth Cause of Action). (ECF No. 50 at 21-27.)

6 Against defendant Citibank N.A., the proposed SAC asserts the following causes of  
 7 action: Negligence (Eleventh Cause of Action); and Fraudulent Misrepresentation (Twelfth Cause  
 8 of Action. (ECF No. 50 at 27-30.)

9 Plaintiff seeks damages, injunctive relief, and to have California Civil Code § 2924g<sup>1</sup>  
 10 declared unconstitutional as applied in this case. (ECF No. 50 at 12, 32-33.)

11 **B. Breach of Fiduciary Duty and Fraud Claims**

12 Under California law, breach of fiduciary duty is a “species of tort distinct from a cause of  
 13 action for professional negligence.” Stanley v. Richmond, 35 Cal.App.4th 1070, 1086 (Cal. Ct.  
 14 App. 1995). The elements of a cause of action for breach of fiduciary duty are: “(1) existence of a  
 15 fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the  
 16 breach.” Id.; see also Benasra v. Mitchell Silberberg & Knupp LLP, 123 Cal.App.4th 1179, 1183  
 17 (Cal. Ct. App. 2004). Constructive fraud, similarly, is a unique species of fraud applicable only to  
 18 a fiduciary or confidential relationship.” Prakashpalan v. Engstrom, Lipscomb & Lack, 223 Cal.  
 19 App. 4th 1105, 1131 (2014), as modified on denial of reh’g (Feb. 27, 2014).

20 Like the FAC, the proposed SAC does not plausibly allege facts showing any defendant  
 21 owed plaintiff a fiduciary duty or that any defendant stood in a confidential relationship with  
 22 plaintiff. Mortgage lenders, loan servicers, and deed of trust trustees do not owe borrowers a  
 23 fiduciary duty. See Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1093 (Ct.  
 24 App. 1991) (“The relationship between a lending institution and its borrower-client is not

25  
 26 <sup>1</sup> California Civil Code § 2924g provides for a “statutory one-day postponement... to avoid the  
 27 loss or forfeiture of equity in the property by affording the owner of the property scheduled to be  
 28 sold a last opportunity to obtain funds with which to pay off the indebtedness secured by the deed  
 of trust under which the trustee’s sale has been scheduled[.]” Whitman v. Transtate Title Co., 165  
 Cal. App. 3d 312, 321 (Cal. Ct. App. 1985).

1 fiduciary in nature.”); Hatch v. Collins, 225 Cal. App. 3d 1104, 1111-12 (Ct. App. 1990),  
 2 modified (Nov. 27, 1990) (rejecting argument that a deed of trust trustee stands in a fiduciary  
 3 relationship to the trustor); Shepherd v. Am. Home Mortg. Servs., Inc., No. CIV 209-1916 WBS  
 4 GGH, 2009 WL 4505925, at \*2 (E.D. Cal. Nov. 20, 2009) (mortgage lenders and loan servicers  
 5 do not owe a duty to loan borrowers).

6 The proposed SAC does not allege facts suggesting any defendant owed him a fiduciary  
 7 duty or the existence of a confidential relationship between any defendant and plaintiff.  
 8 Therefore, plaintiff has no claim for breach of fiduciary duty or constructive fraud.

9 In addition, plaintiff fails to allege any fraudulent conduct by any defendant with the  
 10 required particularity. See Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state

11 with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and

12 other conditions of a person’s mind may be alleged generally.”). To satisfy this standard, a

13 “complaint must identify the who, what, when, where, and how of the misconduct charged, as

14 well as what is false or misleading about the purportedly fraudulent statement, and why it is

15 false.” Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1133 (9th Cir. 2013) (quotation marks and

16 citation omitted); Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (“Federal Rule of

17 Civil Procedure 9(b) requires... an account of the ‘time, place, and specific content of the false

18 representations as well as the identities of the parties to the misrepresentations.’” (citation

19 omitted)). With no alleged fraudulent conduct pleaded with the required particularity, the

20 proposed SAC fails to state any claim sounding in fraud.

### 21 C. Constitutional Challenges

22 The proposed SAC asserts the use of state-sanctioned mechanisms like foreclosure and  
 23 Unlawful Detainer actions “subjects the[ ] processes to constitutional scrutiny” even as to private  
 24 contracts. (ECF No. 50 at 8.) However, the law is settled to the contrary that “California’s  
 25 nonjudicial foreclosure procedure does not constitute state action and is therefore immune from  
 26 the procedural due process requirements of the federal Constitution.” Garfinkle v. Super. Ct., 21  
 27 Cal. 3d 268, 281 (1978). Courts start with the presumption that private conduct does not  
 28 constitute governmental action, and a plaintiff bears the burden of establishing state action. See

1       Florer v. Congregation Pidyon Shevuyim, N.A., 639 F.3d 916, 922 (9th Cir. 2011). Conclusory  
 2       allegations are insufficient to establish state action. See Dietrich v. John Ascuaga's Nugget, 548  
 3       F.3d 892, 900 (9th Cir. 2008).

4                   **D. Negligence Claims**

5       Plaintiff asserts negligence and gross negligence claims against Clear Recon Corp. as  
 6       trustee, and against Citibank N.A., as purchaser of the residential property. The elements of a  
 7       negligence claim are the following: (1) the defendant owed a legal duty to the plaintiff; (2) the  
 8       defendant breached this duty; and (3) the defendant's breach proximately caused the plaintiff's  
 9       injuries. Wiener v. Southcoast Childcare Ctrs., Inc., 32 Cal.4th 1138, 1142 (2004); Ladd v.  
 10       County of San Mateo, 12 Cal. 4th 913, 917 (1996).

11       In California,

12       [a] nonjudicial foreclosure sale is a creature of statute. The trustee's  
 13       role in preparing for and conducting the sale is set forth in detail in  
 14       Civil Code section 2924 et seq. The trustee in nonjudicial foreclosure  
 15       is not a true trustee with fiduciary duties, but rather a common agent  
 16       for the trustor and beneficiary. The scope and nature of the trustee's  
 17       duties are exclusively defined by the deed of trust and the governing  
 18       statutes. No other common law duties exist.

19       Pro Value Properties, Inc. v. Quality Loan Serv. Corp., 170 Cal. App. 4th 579, 583 (2009)  
 20       (internal quotation marks and citations omitted). The proposed SAC does not identify a legal duty  
 21       that Clear Recon Corp. owed plaintiff under California Civil Code § 2924 et seq. Because that  
 22       section sets forth the only legal duties that were owed by a trustee, Pro Value Properties, Inc., 170  
 23       Cal. App. 4th at 583, plaintiff fails to state a negligence claim against Clear Recon Corp. See also  
 24       Rockridge Tr. v. Wells Fargo, N.A., 985 F. Supp. 2d 1110, 1162 (N.D. Cal. 2013) (holding a  
 25       trustee under a deed of trust does not owe a borrower any duty of reasonable care supporting a  
 26       negligence claim under California law).

27       As to defendant Citibank, plaintiff alleges Citibank N.A. owed plaintiff a duty "to act  
 28       responsibly, prudently, and in good faith when asserting ownership of the property and initiating  
 29       [Unlawful Detainer] proceedings." (ECF No. 50 at 27.) However, plaintiff does not allege  
 30       Citibank N.A. owed any duty under California Civil Code Section 2924, et seq. A conclusory  
 31       assertion of a legal duty owed is insufficient to support a negligence claim. See Bell Atlantic

1      Corp. v. Twombly, 550 U.S. 544, 555 (2007) (a plaintiff must provide more than mere labels and  
 2      conclusions or a formulaic recitation of the elements of a cause of action in order to state a claim).

3           The court is unaware of any authority that would support the existence of a legal duty to  
 4      plaintiff by Citibank N.A. under the circumstances of this case. Compare Schneidereit v. Tr. of  
 5      Scott & Brian, Inc., 693 F. App'x 733, 735 (9th Cir. 2017) (dismissing negligence claims against  
 6      purchasers of a property for failure to allege facts sufficient to show a duty owed to them);<sup>2</sup>  
 7      Wright v. Ocwen Loan Servicing, LLC, No. CV-10-01014-MMM-OPX, 2011 WL 13223956, at  
 8      \*16 (C.D. Cal. July 12, 2011) (finding "no authority for the proposition that the purchaser of a  
 9      property at a foreclosure sale owes a duty of care to the property's prior owner"); Monday v.  
 10     Saxon Mortg. Servs., Inc., No. CIV.2:10-989, 2010 WL 2574080, at \*4 (E.D. Cal. June 25, 2010)  
 11     (granting motion to dismiss negligence claim for lack of "authority for the proposition that... the  
 12     purchaser at a foreclosure sale... owes a duty to ensure the legitimacy of the record keeping..."  
 13     where the plaintiff allegedly had not defaulted on the loan).

14           The proposed SAC does not allege facts sufficient to show breach of a legal duty owed by  
 15     defendant Citibank N.A. Moreover, and in any event, plaintiff has filed a notice of pending  
 16     settlement and intent to dismiss Citibank, N.A., from this case. (ECF No. 71.)

17           **IV. Order and Recommendation**

18           In accordance with the above, IT IS ORDERED that the hearing set for March 26, 2025, is  
 19     VACATED.

20           In addition, IT IS HEREBY RECOMMENDED as follows:

21           1. Plaintiff's motion for leave to file a second amended complaint (ECF No. 49) be  
 22     denied.

23           2. Plaintiff's other pending motion styled as a motion to compel (ECF No. 65) be denied  
 24     as moot.

25           3. This action be dismissed without further leave to amend.

26           4. The Clerk of the Court be directed to close this case.

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27           <sup>2</sup> This unpublished disposition is not cited as precedent, but rather, as a persuasive authority. See  
 28     Ninth Circuit Rule 36-3.

1 These findings and recommendations are submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
3 days after being served with these findings and recommendations, any party may file written  
4 objections with the court and serve a copy on all parties. Such a document should be captioned  
5 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
6 shall be served on all parties and filed with the court within seven (7) days after service of the  
7 objections. Failure to file objections within the specified time may waive the right to appeal the  
8 District court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951  
9 F.2d 1153, 1156-57 (9th Cir. 1991).

10 || Dated: March 16, 2025

Carolyn K. Delaney

CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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